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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MOULTON LOGISTICS MANAGEMENT, INC., Plaintiff and Appellant, v. GREENHOUSE INTERNATIONAL, LLC, Defendant and Respondent.	B206062 (Los Angeles County Super. Ct. No. LC080008)

APPEAL from an order of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Reversed and remanded with directions.

Nevers, Palazzo, Maddux & Packard and Michael S. Wildermuth for Plaintiff and Appellant.

Crandall, Wade & Lowe and Edwin B. Brown for Defendant and Respondent.

Greenhouse International, LLC (Greenhouse) filed an action against Moulton Logistics Management, Inc. (Moulton) in the United States District Court for the District of Delaware. Moulton filed a petition in Los Angeles Superior Court for an order compelling Greenhouse to arbitrate its claims. The trial court denied the petition on the ground that Greenhouse's claims were not covered by the parties' arbitration agreement. We reverse the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Greenhouse is a Delaware company that develops and markets health and fitness products. Moulton operates out of California and specializes in inventory management services. In July 2006, Greenhouse and Moulton entered a fulfillment services contract (hereafter Agreement). Moulton agreed to provide services to Greenhouse such as receiving and entering customer orders in a Greenhouse-specific database, filling orders, warehousing Greenhouse's product in Moulton's Van Nuys facility, and providing customer service to Greenhouse's customers. The Agreement included the following arbitration provision:

> "Any controversy or claim arising out of or related to this Agreement or breach thereof, except when injunctive relief or specific performance is sought, shall be settled by arbitration. The office of the American Arbitration Association will arbitrate said controversy or claim, with jurisdiction in Los Angeles, California. In the event that a dispute is submitted to arbitration, the arbitrator may award costs and reasonable attorney's fees to the prevailing party. The award of the arbitrator shall be of the same force and effect as a final enforceable judgment of a court of competent jurisdiction."

The parties' relationship was troubled during the one-year term of the Agreement. Moulton asserted that Greenhouse failed to make timely payments. Greenhouse contended that Moulton's performance was poor. In May 2007, Greenhouse gave Moulton notice that it would terminate the Agreement effective July 31, 2007. However, the parties continued to have disputes regarding alleged past due invoices and the transition of Greenhouse's database and account to a new fulfillment services company.

On November 9, 2007, Greenhouse filed a civil complaint against Moulton in the United States District Court for the District of Delaware. The complaint alleged that Moulton breached the Agreement, engaged in various deceptive acts during the term of the Agreement, and improperly retained portions of the Greenhouse client information database after Greenhouse terminated the contract. The complaint asserted causes of action for misappropriation of trade secrets; replevin; conversion; tortious interference; violations of the Lanham Act (15 U.S.C. § 1125(a)(1)(A)); deceptive and unfair trade practices under Delaware law (6 Del. C. § 2532(a)); and breach of contract based on six different sets of facts. The complaint sought a permanent injunction in addition to monetary and punitive damages.

On December 18, 2007, Moulton filed a petition to compel arbitration in the Los Angeles County Superior Court. On January 7, 2008, it also filed a motion in the district court to stay the federal action pending arbitration. On January 22, 2008, Greenhouse opposed the motion to stay the federal litigation and moved for an order from the district court enjoining Moulton from pursuing the petition to compel in California. On February 20, 2008, the trial court denied the petition to compel arbitration. The court determined that Greenhouse's claims were not subject to arbitration because the complaint sought injunctive relief. Moulton's appeal followed.

DISCUSSION

I. Greenhouse's Request for Injunctive Relief Does Not Render All of its Claims Nonarbitrable

"A written agreement to submit to arbitration . . . a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.)[1] "On petition of a party . . . alleging the existence of a written agreement to arbitrate a controversy . . . , the court shall order the [parties] to arbitrate the controversy if [the court] determines that an agreement to

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

arbitrate the controversy exists . . . ." (§ 1281.2.) On appeal, a trial court's determination that a valid agreement to arbitrate exists or, conversely, does not exist, will be affirmed if it is supported by substantial evidence. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.)

Appellant contends California and federal law require that the claims in this case be arbitrated. Further, that the trial court erred in determining the request for injunctive relief prohibited it from compelling arbitration. We agree.

At issue here is the interpretation of the Agreement's provision that "[a]ny controversy or claim arising out of or related to this Agreement or breach thereof, *except when injunctive relief or specific performance is sought*, shall be settled by arbitration." (Italics added.) The trial court ruled: "The Federal District Court action seeks injunctive relief, and by the terms of the arbitration clause contained in the parties' 'Fulfillment Services Agreement,' that puts this controversy within the exception. Therefore, this matter cannot be arbitrated**.**"

"When interpreting contracts, the language used controls if it is clear and explicit. We must view the language of a contract as a whole, avoiding a piecemeal, strict construction approach. . . . Where an agreement is capable of being interpreted in two ways, we should construe it in order to make the agreement ' "lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity. [Citations.]" [Citation.]' [Citation.] Because of California's public policy that generally favors arbitration, we will uphold arbitration unless we can say with assurance that an arbitration clause cannot reasonably be interpreted to cover a dispute or otherwise cannot be enforced. [Citation.]" (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633.) The same rule applies under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). (*Gay v. CreditInform* (3d Cir. 2007) 511 F.3d 369, 387.) "To the extent possible, an exclusionary clause in an arbitration provision should be narrowly construed." (*Gravillis v. Coldwell Banker Residential Brokerage Company* (2006) 143 Cal.App.4th 761, 771.) In interpreting an arbitration provision, we must resolve all

doubts in favor of arbitration. (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 384, citing *Moses H. Cone Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25.)

Applying these principles requires that we reject the trial court's interpretation of the arbitration provision. The provision states that any claim or controversy related to or arising from the agreement shall be settled by arbitration, "except when injunctive relief or specific performance is sought . . . ." Greenhouse contends this means that a civil action is allowed to resolve contract disputes of claims that do not seek injunctive relief or specific performance, so long as such relief is sought as to other claims being asserted at the same time. Assuming for discussion's sake only that Greenhouse's interpretation is reasonable, it is neither the only nor the most reasonable interpretation.

First, Greenhouse's reading of the agreement would render the arbitration provision largely ineffective because either party could easily avoid arbitration simply by requesting injunctive relief, even if the underlying dispute is otherwise arbitrable. This defeats the purpose of the provision and runs contrary to the federal and California public policy favoring arbitration where the parties have agreed to arbitrate. Second, at a minimum, the provision can also be read to require arbitration of claims where injunctive relief or specific performance are not sought, with claims that do seek those remedies severed or split off from the ones that do.

Moreover, while the provision states that all claims arising from the contract shall be settled by arbitration except when injunctive relief or specific performance are sought, it provides no indication that such claims are to be resolved by civil litigation. For instance, the provision specifies that arbitration must take place in Los Angeles with the American Arbitration Association, gives the arbitrator authority to award costs and attorney's fees to the prevailing party, and states that the arbitrator's decision will have the same force and effect as would a final court judgment. By contrast, the provision never mentions civil litigation and does not authorize an award of fees and costs for court actions. This suggests that civil litigation may not be the proper forum to *resolve* contract

disputes where injunctive relief is sought. (See *Segal v. Silberstein, supra,* 156 Cal.App.4th at pp. 633-635.)

We resolve these ambiguities in favor of the broadest possible reading of the arbitration provision. Thus, we believe that all claims related to the contract must be arbitrated, although once a party has prevailed in that process, it may seek injunctive relief or specific performance from a proper court in aid of the arbitration process. Such a result has been endorsed by other courts faced with similar issues, albeit when construing admittedly dissimilar arbitration provisions. (See *Airtel Wireless, LLC v. Montana Electronics Co.* (D.Minn. 2005) 393 F.Supp.2d 777, 786-788 [provision requiring arbitration of all claims other than those for injunctive relief or specific performance was modified by companion provision stating that injunctive relief was allowed to maintain the status quo pending arbitration]; *Remy Amerique v. Touzet Distribution* (S.D.N.Y. 1993) 816 F.Supp. 213, 217-218 [provision required arbitration of all claims arising from agreement, but permitted parties to seek temporary or permanent injunctions from either the arbitrator or a proper court; district court harmonized these provisions to mean that obtaining such relief from a court was proper only to maintain the status quo pending arbitration, and did not permit the transformation of arbitrable claims into non-arbitrable ones depending on the form of relief prayed for].)

It remains, however, that under this narrow interpretation of the provision Greenhouse's complaint presents arbitrable and inarbitrable issues. Such a result is permissible. "United States Supreme Court case law makes clear that when a suit contains both arbitrable and inarbitrable claims, the arbitrable claims should be severed from those that are inarbitrable and sent to arbitration. (*Dean Witter Reynolds Inc. v. Byrd* [(1985) 470 U.S. 213, 221 (*Byrd*)].) This is so even when severance leads to inefficiency. (*Ibid.*)" (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1088 (*Broughton*).) The California Supreme Court has applied the same reasoning to arbitrable and inarbitrable remedies derived from the same statutory claim. (*Ibid.*; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303.) For example, under the Consumer Legal Remedies Act and Business and Professions Code sections 17200 and

17500, arbitrable claims for damages must be resolved in arbitration while claims for public injunctive relief must be decided in court. (*Broughton, supra*, 21 Cal.4th at p. 1088; *Cruz, supra*, 30 Cal.4th at pp. 316, 320; *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 691-692 (*Coast Plaza*).) Although we are concerned here with private injunctive relief that is inarbitrable by contract, we find the reasoning of *Broughton* and *Cruz* applicable as to severance. In sum, Greenhouse must arbitrate its claims for damages. Only the claim for an injunctive remedy may not be compelled to arbitration.

Greenhouse contends that even if its claims for damages should be arbitrated, section 1281.2, subdivision (c) (section 1281.2(c)) requires that arbitration be delayed until the injunctive relief issues are resolved.[2] Assuming without deciding that section 1281.2(c) would apply to the parties' agreement,[3] we reject Greenhouse's argument.

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[2] Section 1281.2, subdivision (c) provides in relevant part: "If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies."

[3] The parties agree that the FAA applies to their agreement. (*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265.) The FAA contains no corollary to section 1281.2(c) and does not give a trial court discretion to delay arbitration. (*Byrd, supra*, 470 U.S. at p. 222.) Section 1281.2(c) is a procedural rule under California law that applies instead of the FAA if the parties have agreed that California law will govern their arbitration agreement. This court recently analyzed FAA preemption of section 1281.2(c) in a case in which the parties' contract did not contain a choice-of-law provision, but the contract incorporated the dispute resolution provisions of a second contract that was explicitly governed by California law. (*Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 Cal.App.4th 1320.) We concluded that the trial court properly applied section 1281.2(c) in that case. (*Best Interiors*, at pp. 1327-1328.) In this case however, the parties' contract does not contain a choice-of-law provision, and the record before us does not indicate that the Agreement incorporates any other document that applies California law to the Agreement or any disputes arising under the Agreement. We need not decide whether the FAA preempts application of section 1281.2(c) under these circumstances.

The only issue not subject to arbitration is Greenhouse's request for injunctive relief. Litigation cannot proceed on the injunctive remedy alone without consideration of the arbitrable issues. Greenhouse must prevail on the merits of its underlying claims to be entitled to the injunctive remedy it seeks. Thus, it is the determination of issues subject to arbitration that may render litigation of the inarbitrable issues moot, not the other way around. Section 1281.2(c) is therefore inapplicable. (Cf. *Coast Plaza*, *supra*, 83 Cal.App.4th at p. 693 [where parties were compelled to arbitrate all causes of action except entitlement to injunctive relief, the court held that litigation of the injunctive remedy should be stayed until the arbitration resolved the underlying issues on the merits].)

II. A California Court's Ruling on Moulton's Petition to Compel Arbitration Does Not Interfere with the District Court's Jurisdiction

To avoid this result, Greenhouse argues that a California court ruling on Moulton's petition to compel arbitration would improperly interfere with the district court's jurisdiction. We disagree.

Greenhouse correctly points out that the district court could exercise supplemental jurisdiction over Moulton's petition to compel arbitration. (28 U.S.C. § 1367; *Drexel Burnham Lambert, Inc. v. Valenzuela Bock* (S.D.N.Y. 1988) 696 F.Supp. 957, 959.) But Greenhouse cites no authority to support its argument that Moulton therefore was *limited* to petitioning the district court to compel arbitration. With the exception of actions in rem or quasi in rem, "a federal court may proceed concurrently with a state court, and a state court concurrently with a federal court, until the first judgment is rendered and becomes res judicata. The priority rule 'is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' [Citations.]" (2 Witkin, California Procedure (4th ed. 1996) Jurisdiction, § 422, p. 1033, quoting *Kline v. Burke Constr. Co.* (1922) 260 U.S.

226.) The petition to compel arbitration is not an action in rem or quasi in rem.[4] Greenhouse's assumption that its act of initiating litigation in the district court automatically prevents a California court from ruling on a related petition to compel arbitration for jurisdictional reasons is incorrect.[5]

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[4] *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 994, footnote 14 explained: "An in rem action is a proceeding against the property itself and potential claimants are bound by a judgment against the property. An in personam action is a proceeding between the parties and only the parties and those in privity with them are bound by the judgment."

[5] After the case was submitted for decision, Greenhouse requested that this court take judicial notice of a magistrate judge's order in the district court denying Moulton's motion for a stay of the litigation pending arbitration pursuant to 9 U.S.C. § 3. Greenhouse has also requested that we take notice of the accompanying hearing transcript. Although we grant the request under Evidence Code section 452, subdivision (d)(2), Greenhouse has failed to explain how the materials are germane to our consideration of the appeal. We would hope to avoid conflicting rulings between the California and district of Delaware courts. However, we have no indication that the magistrate's order is final. The parties had an opportunity to file objections to the order, and the document itself ambiguously purports to be both an order, but also a report and recommendation that must be accepted by the district court under 28 U.S.C. § 636(b)(1)(b), Fed. Rules Civ. Proc., rule 72(b). When federal and state courts are presented with parallel actions, a California court has the discretion, but not the obligation, to stay the state matter. (*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804.) Greenhouse did not seek a discretionary stay of the proceedings in the trial court. And while one court's *final* order denying or compelling arbitration may preclude a second court from subsequently deciding the issue, we have no indication that we are faced with that scenario here. (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 803; *Southeast Resource Recovery v. Montenay Intern.* (9th Cir. 1992) 973 F.2d 711, 713-714; *Towers, Perrin, Forster & Crosby, Inc. v. Brown* (3d Cir. 1984) 732 F.2d 345, 350.) We note that Greenhouse does not suggest in its request for judicial notice that this court's review could or should be affected by the magistrate's order.

DISPOSITION

The order denying appellant's petition to compel arbitration is reversed. The cause is remanded to the trial court with directions to enter a new order granting the petition and ordering arbitration of respondent's claims, except for its claims for injunctive relief. Appellant is awarded its costs on appeal.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J